Nos. 75-636 and 75-672

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-636

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

No. 75-672

T.I.M.E.-DC, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BRIEF FOR PETITIONER T.I.M.E.-DC, INC.

ROBERT D. SHULER
R. IAN HUNTER
JOHN W. ESTER
100 West Long Lake Road - Suite 102
Bloomfield Hills, Michigan 48013
Counsel for Petitioner,
T.I.M.E.-DC, Inc.

Of Counsel:
MATHESON, BIENEMAN,
PARR, SCHULER & EWALD
100 West Long Lake Road - Suite 102
Bloomfield Hills, Michigan 48013

INDEX

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Nos. 75-636 and 75-672

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-636

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

No. 75-672

T.I.M.E.-DC, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BRIEF FOR PETITIONER T.I.M.E.-DC, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 299 and is reproduced in the Appendix to the Petition for Certiorari in No. 75-636 (Pet. A. 1).[1]

The pertinent District Court's preliminary opinions are reproduced in the Appendix to Petition for Certiorari in No. 75-636 as follows:

December 31, 1971, 335 F. Supp. 246; 4 F.E.P. Cases 77 (Pet. A. 45)

1. "Pet. A." refers to the Appendix to Petition for Certiorari in No. 75-636, while "A." refers to the Single Appendix.

January 20, 1972; 4 F.E.P. Cases 875 (Pet. A. 50)

October 19, 1972; 6 F.E.P. Cases 690 (Pet. A. 56)

December 6, 1972; 6 F.E.P. Cases 703 (Pet. A. 79)

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Pet. A. 1). A timely petition for a writ of certiorari was filed by the International Brotherhood of Teamsters ("IBT") in No. 75-636 on October 29, 1975, and by T.I.M.E.-DC, Inc. ("T.I.M.E.-DC") in No. 75-672 on November 6, 1975. On May 24, 1976, the Court granted and consolidated the two petitions. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.*, as amended, of primary importance to T.I.M.E.-DC's petition[2] are as follows:

Section 703(a), 42 U.S.C. Section 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(j), 42 U.S.C. Section 2000e-2(j):

---

2. Additional relevant provisions of Title VII are set forth at Pet. A. 119-124.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

QUESTIONS PRESENTED

1.

Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

2.

In fashioning a remedy in a pattern and practice case does a District Court have discretion to award relief to individuals on the basis of the degree of injury suffered by each individual (as held by the District Court), or must all minority employees in the affected class be awarded relief, regardless of the injury suffered (as held by the Court of Appeals)?

3.

Are there different standards for determining individual relief under Tile VII of the Civil Rights Act of 1964, depending upon whether the suit is an individual or a class action, or a pattern and practice suit?

4.

Where a union contract provides that laid off employees have first call to reinstatement rights for a three-year period, may individual minority employees who have never been employed in such positions and who are not found to have been affected by racial discrimination be granted priority over laid off employees?

STATEMENT OF THE CASE

I.

The Facts

As stated by the Court of Appeals, "This governmental pattern and practice suit is one more in an ever-increasing number of Title VII employment discrimination cases arising out of the trucking industry and primarily involving the *past* exclusion of minority group members from the job of over-the-road line-drivers."[3] (Emphasis supplied). The Attorney General sued T.I.M.E.-DC, a transcontinental common motor carrier, and IBT under Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, alleging that the defendants were engaged in a pattern and practice of discrimination with respect to the employment of black and Spanish-surnamed American (SSA) persons.[4]

---

3. 517 F. 2d 299, 302; Pet. A. 1, 2.

4. Two separate suits were brought and ultimately consolidated for trial, the first alleging a pattern and practice of discrimination at the employer's Nashville terminal, the second charging T.I.M.E.-DC and IBT with engaging in a pattern and practice of discrimination on a systemwide basis.

The essence of the government's claims was that T.I.M.E.-DC and its predecessors[5] had discriminated by assigning blacks and SSAs to lower paying and less desirable job classifications while reserving for whites the higher paying and more desirable classifications, by refusing to promote or transfer minority employees to more desirable positions and by maintaining a system of promotions and transfers which perpetuated the effects of the company's past discrimination. It was also the claim of the government that IBT (by itself and through its Area Conferences and Locals) had engaged in a pattern and practice of discrimination by entering into contracts which tended to perpetuate the effects of the employer's past discrimination by impeding the transfer of blacks and SSAs to more desirable jobs.

The contractual provisions in question are neutral on their face and do not prohibit employees from transferring from one classification to another. Nor did the company have any policy prohibiting employees from transferring from one unit to another.[6] When they do, they retain their full *company* seniority, which is measured from date of hire and is utilized to compute fringe benefits such as vacations, pensions and holidays. However, a transferring employee acquires new *unit* seniority as of the date of entry into the new unit which "establishes his seniority for purposes of bidding and lay-off in the job he transfers to."[7]

The government contended that the facially neutral contract provisions operated "to impede the free transfer of minority groups," because a transferring employee could not carry over his seniority from one classification (unit) to another

---

5. T.I.M.E.-DC, a nationwide motor freight system, is a product of no less than ten mergers over a 17-year period. The company's merger history is set forth in the Opinion of the Court of Appeals at 517 F. 2d 299, 304; Pet. A. 5.

6. With the exception of the Memphis terminal for the period of 1958 through 1968, during which time city drivers were not permitted to transfer to line-driver positions. In December of 1968 the company adopted a policy at Memphis of offering vacancies in line-driver jobs to qualified city employees before filling the jobs with persons "off the street." 517 F. 2d 299, 313; Pet. A. 22.

7. Pre-trial Order ¶ 3 (15), A. 48.

for lay-off and bid purposes. The government admittedly did not allege "that the bargaining units were established for the purpose of discrimination on the basis of race or national origin."[8]

II.

The Consent Decree

During the course of the trial in the District Court the government and T.I.M.E.-DC entered into a consent decree[9] which "resolved those issues relating to T.I.M.E.-DC's alleged practice of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified Blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination."[10]

In entering the consent decree the District Court specifically indicated that the decree did "not constitute an adjudication or finding on the merits of the case", nor was it to "be construed as an admission by T.I.M.E.-DC of any violation of Title VII."[11]

The consent decree, a portion of which was expressly adopted by the District Court in its final order, provided that job openings at T.I.M.E.-DC terminals would first be offered to "those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964," and that after such individuals had been offered an opportunity to qualify for a line-driver (LD) vacancy T.I.M.E.-DC would fill future vacancies on a one-to-one (minority to white) hiring ratio until

---

8. Pre-trial Order ¶ 3 (17), A. 49.

9. "Decree in Partial Resolution of Suit"; Pet. A. 85.

10. Government's Brief to the Court of Appeals, pages 4-5.

11. Pet. A. 86.

the terminal reached the minority percentage equal to that of the city or metropolitan area in which the terminal was located.[12]

The consent decree further provided for payment by T.I.M.E.-DC of $89,500.00 to the government for distribution to alleged discriminatees in amounts to be determined by the plaintiff's attorneys, not to exceed $1,500.00 to any one person. The consent decree thus left for trial the questions of whether there was in fact a pattern and practice of discrimination, and, if so, which, (if any) employees were "individual or class discriminatees suffering the present effects of [such] past discrimination." In entering the Court decree the Court also noted that it retained jurisdiction "for such further relief or other orders as may be appropriate."

III.

The District Court Order

As indicated above, the consent decree was entered into during the course of the trial in May of 1972. All parties introduced live testimony and the government introduced a number of depositions and summaries of depositions. The District Court concluded on the basis of the government's statistical and other evidence that T.I.M.E.-DC had not hired minorities in proportion to their numbers in the various terminals, had not allowed minorities to engage in the "choice" jobs in the terminal (such as line-driver) and that the facially neutral union contracts had operated to impede the free transfer of minority groups. In short, the District Court concluded that the defendants had engaged in a pattern and practice of employment discrimination unlawful under Title VII.

In determining what persons, if any, were discriminatees suffering the present effects of the unlawful discrimination and thus entitled to relief the Court asked the government to submit a list of individuals for whom relief was sought. Such a list[13] was filed, categorizing into an "affected class" by terminal and job classification those incumbent employees for whom relief was

---

12. Decree in Partial Resolution of Suit, ¶ 13; Pet. A. 90-91.

13. "Individuals For Whom Plaintiff Seeks Relief"; A. 191-224.

sought. With one exception[14] the incumbents in question were blacks and SSAs assigned to city operation and serviceman jobs at T.I.M.E.-DC terminals that maintained a line-driver operation prior to 1969. Relief was thus sought with respect to 20 of T.I.M.E.-DC's 51 terminals.[15]

The government asked the District Court to grant class and individual seniority relief to approximately 380 incumbent employees (of whom some 34 individuals sprinkled throughout the classes testified). The government asked that all members in the class be offered an opportunity to transfer to future vacancies in line-driver jobs (or other jobs from which they had been excluded) on the basis of their company seniority, which they would take to their new jobs for all purposes, including bidding and lay-off.

The District Court found that while the incumbent minority employees in question were members of the "affected class" of discriminatees, not all of them were injured simply by being members of the class, and those who were injured were not all affected to the same degree. Consequently, the Court gave relief to employees within the class dependent upon the Court's view of the degree to which each was damaged by the employer's racial discrimination.[16]

Listed on Appendix A were 30 individuals who, according to the District Court, "have suffered severe injury because of the practice and plan of discrimination" by T.I.M.E.-DC and its predecessors. These individuals were given the right (unavailable to white employees) to transfer to road employment with seniority for bidding and lay-off purposes carried back to July 2, 1965 (the effective date of Title VII).

Four individuals were placed in the trial court's Appendix B, because the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting

---

14. A group of white employees at the Memphis terminal hired before the terminal ceased allowing a few city drivers to transfer to line drivers.

15. As recognized by the Court of Appeals at 517 F. 2d 299, 308; Pet. A. 12.

16. See trial court's "Final Order." Pet. A. 94, 100 ff.

therefrom." These employees were given the opportunity to transfer to road jobs with seniority carried back to January 14, 1971 (the date of filing of the systemwide pattern or practice suit in the Northern District of Texas).

The remaining incumbents in the class were placed in Appendix C. While the Court indicated it had no evidence to show that these individuals were harmed by the discrimination to the class as a whole, they were nevertheless held entitled to road vacancies with seniority as of the date of future entry into the road unit. They therefore would have preference over the general public and over incumbent white city employees.

The District Court thus attempted to exercise its discretion and fashion a remedy consistent with the degree of injury suffered by the members of the affected class. In addition, the Court prescribed a number of conditions to guarantee that the employer would implement the provisions of the consent decree as well as the provisions of the Court's order. The relief granted was restricted to future vacancies, and a position was not to be considered vacant if there was a seniority roster employee on lay-off unless the lay-off had been in existence for at least three years. The Court also altered the Modified Seniority System of the Southern Area Conference and "specifically tailored relief to cover miscellaneous and unique circumstances at other terminals."[17] All parties appealed from the decision of the District Court.

IV.

The Court of Appeals Opinion

On appeal the Court of Appeals affirmed the lower court's holding that the defendants had engaged in an unlawful pattern of employment practices, but rejected the trial court's gradations of relief as reflected by Appendices A, B and C. The Court held that the lower court had misconceived the purpose and procedural structure of a pattern and practice suit by requiring or permitting individualized proof of discrimination

17. Pet. A. 15.

and injury. This approach, said the Court, would "defy reason and waste precious judicial resources," saying that "whatever evidentiary hearings are required for individuals can well be postponed to the remedy."[18]

The Court of Appeals accordingly remanded the case for further evidentiary hearings, ordering the District Court to eliminate the distinctions prescribed for those in Appendices A, B and C and holding that "for all members of the class there should be full company employment seniority carry-over for bidding and lay-off purposes, subject . . . to the proper application of the qualification date principle."[19]

In addition to requiring the trial court on remand to eliminate the distinctions between members of the affected class as prescribed in Appendices A, B and C, the Court of Appeals indicated that there might be need for "an evidentiary exploration of the distinction between incumbents, former employees and applicants who were never hired."[20] Inasmuch as the government on appeal disclaimed "any attempt to seek review of the District Court's failure to grant individual relief to the rejected applicants or former employees in App. C,"[21] the Court of Appeals opinion thus raises the possibility that on remand the District Court could grant relief beyond that sought by the government and beyond the scope of the issues before the Court of Appeals.[22]

---

18. 517 F. 2d 299, 319; Pet. A. 34. From the Court's reference to postponement of evidentiary hearings "to the remedy" it is evident the Court of Appeals believed that the lower court had improperly received individualized proof of injury at the *liability* stage of a bifurcated proceeding. This is also apparent from the Court's remark that, "for all we know, *at this stage* some on Appendix C may have suffered more egregious discrimination than those whom the government singled out to be persuasive witnesses to establish pattern and practice." (Emphasis supplied). In fact there was a full trial of *all* the issues before the District Court, involving *remedy* as well as *liability*.

19. 517 F. 2d 299, 321; Pet. A. 38.

20. *Id.*

21. 517 F. 2d 299, 317; Pet. A. 31.

22. "The issue then is not really before us as to those applicants for jobs who were not incumbents." 517 F. 2d 299, 317; Pet. A. 31.

The Court of Appeals also modified the District Court order in several other important respects. While acknowledging that the provision in the union contract granting laid off line-drivers a three year period in which to move into vacancies at their home terminal without competition was not adopted for discriminatory purposes, the Court held that this "would unduly impede the eradication of past discrimination" and consequently modified the decree to require laid off line-drivers to compete with members of the affected class for any vacancy " which is not a purely temporary one" at the terminal in question."[23]

The Circuit Court also altered the Modified Seniority System of the Southern Area Conference. Under that system laid off line-drivers could compete for vacancies or bump junior line-drivers at other terminals within the Southern Conference. As modified, a laid off LD in the Southern Conference may continue to bump junior LDs at other terminals, but may not move to another terminal where a vacancy exists and take priority over any affected class member. The laid off line-driver who bumps a junior driver at another terminal may exercise his right of recall when an opening occurs at his own terminal, but when an opening occurs at the terminal where the bump took place, members of the affected class may compete on the basis of seniority with the LD on lay-off who was bumped (or with any other LD on lay-off at that terminal).

Finally, to "speed up the advancement of discriminatees into the LD position" members of the affected class in the Southern Conference may bid on LD openings at other terminals within the Conference in competition with employees at that terminal on the basis of employment seniority after all members of the affected class at that terminal have been given the opportunity to bid on the position.[24]

The Court thus remanded the case "for futher evidentiary and judgmental proceedings," noting that the District Court should feel free to fully use special masters in view of the large numbers of people involved.[25]

---

23. 517 F. 2d 299, 322; Pet. A. 41. A "purely temporary" vacancy is not defined in the Opinion.

24. 517 F. 2d 299, 323; Pet. A. 42, 43.

25. *Id.* at 324; Pet. A. 44.

SUMMARY OF ARGUMENT

I.

Incumbency statistics alone should not be held conclusive in establishing a pattern or practice of employment discrimination at various terminals of a transcontinental motor carrier. It is evident both from the language of Title VII and from its legislative history that it was not intended to require an employer to achieve a racial balance in his work force, but rather to end discrimination in hiring. This Court, while recognizing that statistics may reflect discrimination, has continued to maintain that a complaining party or class must make out a prima facie case of discrimination and has never held that demographic statistics alone are conclusive.

Under the decision of the Court of Appeals the failure of T.I.M.E.-DC to move from an admitted racial imbalance in 1964 to a complete racial balance in 1971 was of *decisive* significance, despite the company's acknowledged "laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." Ample evidence of the company's progress was introduced at the trial, as well as evidence establishing the deficiencies in the government's bare statistics. The company similarly demonstrated that the government's witnesses were not the victims of individual or class discrimination. Under these circumstances the trial court's findings of individual discrimination were erroneous, let alone the holding that the government established an unlawful pattern or practice of employment discrimination.

II.

Assuming *arguendo* that the District Court properly found that petitioner had engaged in an unlawful pattern or practice of employment discrimination, in exercising its equitable jurisdiction at the conclusion of a full trial on the merits the Court was entitled to grant seniority relief on the basis of the extent of injury suffered by the individual employees in question. Apparently believing that only the issue of liability was tried in the District Court, the Court of Appeals erred in rejecting the

District Court's remedy and ordering that all members of the affected class were entitled to full seniority carry-over for all purposes, irrespective of whether they were actually injured by discrimination. The Circuit Court's decision did not represent a proper application of the "rightful place" doctrine and would require the parties to retry issues already full litigated.

III.

Whether an action is brought by an individual for himself or on behalf of a class of individuals, or by the government on behalf of a class, the critical questions are the same: Was there unlawful racial discrimination, was the individual damaged thereby and, if so, what will it take to put him in his "rightful place" in the work force? Contrary to the holding of the Fifth Circuit, the criteria announced by this Court in *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792 (1973), are relevant in answering these crucial questions. The Court of Appeals erred in summarily rejecting petitioner's efforts to apply the *McDonnell Douglas* criteria to the evidence below.

IV.

The Court of Appeals erred in upsetting that portion of the District Court's final order designed to protect laid off incumbents, thus invalidating a contractual provision which admittedly was not adopted for discriminatory purposes. Under the decision of the Circuit Court, members of the affected class may compete with laid off line-drivers for any vacancy "which is not a purely temporary one." This ambiguous requirement would be impossible to enforce without further definition, would cause administrative difficulties for the company and would require the company to engage in reverse discrimination contrary to the legislative intent of Title VII.

ARGUMENT

I.

STATISTICS REFLECTING A PRESENT DISPARITY IN THE PROPORTION OF WHITE VERSUS MINORITY INCUMBENT EMPLOYEES SHOULD NOT BE HELD "DISPOSITIVE" IN PROVING A PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION.

As recognized by the Court of Appeals, the District Court's conclusion that the defendants had engaged in an unlawful pattern and practice of employment discrimination in large part was based upon 1971 statistics reflecting the racial composition of various job classifications. The Court of Appeals agreed that such statistics are not only significant, but may be "dispositive" and "decisive."[26] In support of this proposition the Court of Appeals cited a number of cases, many of which were decisions of the Fifth Circuit itself.[27] The Circuit Court indicated that "for this very industry and employment practices" the holding in the cited cases "eliminates all doubts of the decisive significance of flagrant statistical deviations."[28]

It is evident from its own terms, as well as from its legislative history, that Title VII was not intended to require an employer to achieve a racial balance in his work force, but rather to end discrimination in hiring. This could hardly have been set forth more clearly than in Section 703(j) of the Act, which provides as follows in relevant part:

---

26. 517 F. 2d 299, 313; Pet. A. 23.

27. Including *United States* v *Hayes International Corp.*, 456 F. 2d 112, 120 (5th Cir. 1972), where the Court held that "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference" and *Rodriguez* v *East Texas Motor Freight*, 505 F. 2d 40, 53 (5th Cir. 1974), where the Court stated that "a prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone." *Rodriguez* is now pending in this Court, petitions for certiorari having been granted and consolidated in Nos. 75-651, 75-715 and 75-718.

28. 517 F. 2d 299, 313; Pet. A. 23. Other courts have disagreed that statistics alone are conclusive. *E.g.*, *Senter* v *General Motors Corp.*, 532 F. 2d 511, 527 (6th Cir. 1976), where the Court noted that statistical evidence, while quite revealing, was "not conclusive" in the Sixth Circuit. The Court acknowledged (in note 42), that "Other courts have held that statistics alone may be sufficient to establish a prima facie case of discrimination," citing several decisions from the Fifth Circuit and one from the Eighth.

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of such race . . . in any community . . . ."

In explaining the purpose of this provision, Senator Humphrey, one of the supporters of the legislation, stated that the section was added to state clearly and accurately what the proponents of the Bill had carefully stated on numerous occasions, "That Title VII does not require an employer to achieve any sort of racial balance in its work force by giving preferential treatment to any individual or group."[29]

As reflected by Senator Humphrey's statement, during the legislative deb[illegible] there had been persisting doubts that the real purpose of Title VII was not merely to end discrimination, but to achieve racial balance.[30] In response to this suggestion Senators Clark and Case, floor managers of the Bill in the Senate, issued an interpretative memorandum saying the following:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would invoke a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race . . . ."[31]

Title VII thus was enacted upon assurances by sponsors of the Bill that the legislation was not intended to require an employer to maintain a racial balance in his work force. That a

---

29. EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, 3005.

30. See EEOC Legislative History of Title VII and XI of the Civil Rights Act of 1964, 2067-68.

31. EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, 3040.

racial imbalance without proof of discriminatory treatment provides no basis for relief under Title VII was recognized by this Court in *Griggs* v *Duke Power Company*, 401 U.S. 424, 430-31 (1971):

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

In subsequent decisions the Court has touched on the use of statistics as evidence of unlawful discrimination, but has not directly considered the use of demographic statistics to prove employment discrimination. In *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792, 805 (1973), the Court noted that "Satistics as to petitioner's employment policy and practice may be *helpful* to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern or discrimination against blacks." (Emphasis supplied). The Court said that the District Court might, for example, "determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.'" However, the Court added the following *caveat:*

> "We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire."

In *Albemarle Paper Company* v *Moody*, 422 U.S. 405, 95 S. Ct. 2362, 2375 (1975), the Court reiterated that the complaining party or class must make out a prima facie case of discrimination, citing *McDonnell Douglas, supra,* but did not spell out what is sufficient to establish such a case.

Again in the recent case of *Franks* v *Bowman Transportation Co., Inc.*,____ U.S. ____, 96 S Ct. 1251, 1268 (1976), reference is made to the plaintiffs' initial burden "of demonstrating the existence of a discriminatory hiring pattern and prac-

tice." While the Opinion discusses the sort of evidence respondents may introduce once the plaintiffs have carried their burden, there is no analysis of the quality or quantity of evidence necessary for plaintiffs to sustain this initial burden.

Under the approach of the Fifth Circuit, the plaintiff in a class action can establish a prima facie case that an employer has engaged in a pattern or practice of employment discrimination throughout its system by simply introducing statistics reflecting a racial imbalance in various job classifications. Admittedly when the Civil Rights Act was passed in 1964, there was a racial imbalance in the work force of T.I.M.E.-DC's predecessors, as there was elsewhere in the trucking industry and indeed throughout the nation's work force. Under the Fifth Circuit's simplistic approach presumably every employer is engaged in an unlawful "pattern or practice" of resistance to the full enjoyment of the rights secured by Title VII until through preferential hiring or firing the employer can meet the standard metropolitan statistical area (SMSA) ratios.[32]

The evidence reflecting T.I.M.E.-DC's progress in the area of equal employment (despite a substantial decline in the company's total work force) was ample. While total employment dropped from 7,238 employees in 1967 to 6,424 in 1972 (a decrease of 11.2%), the number of minorities increased from 512 to 677 in the same years (an increase of 32.2%).[33] Similarly, at the ten terminals regarding which plaintiff took depositions, total employees declined by 12% during this period, while the percentage of minority employees increased 20.6%.[34]

Systemwide, minorities went from 7.1% of the work force in 1967 to 10.5% in 1972,[35] and in 1972 16.5% of the city and

---

32. As illustrated by the instant case, this is so even if the employer has made a "laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment," as found by the Circuit Court below.

33. During this six-year period the number of black employees increased by 45.3%, Exhibit TT; A. 899.

34. At these terminals the percentage of *blacks* increased to 28.5% of the work force. Exhibit UU; A. 905.

35. Exhibit CCC; A. 974.

dock employees were minorities.[36] As a result of T.I.M.E.-DC's campaign to hire minorities, in 1971 16.9% of all new hires in the system were minorities and 23.1% of the total hires in the western portion of the system. Significantly, 18.3% of the newly hired road drivers in the west were minorities.[37] The dramatic improvement continued after the trial in the District Court.[38] These statistics, it is submitted, reflect that T.I.M.E.-DC clearly has broken whatever old patterns of discriminatory employment practices existed.

Contrasted with these statistics were the raw statistics of the government. The thrust of these "proofs" was that T.I.M.E.-DC employed a lesser percentage of minorities in the jobs of line-driver and mechanic than the percentage of minorities in the communities where T.I.M.E.-DC maintained terminals, according to standard metropolitan statistical area (SMSA) and "urban places" statistics. The government was unable to show the precise area embraced by the SMSA or urban place surrounding any given city, nor did it have any way of relating how close the minority community generally was to the location of the T.I.M.E.-DC terminals,[39] what type of transportation was available from the minority community to the terminals, nor what portion of the minority community would be suited by age and health to perform the type of operations involved in the trucking business. Nor did the government's statistics consider any governmental, employer or industry job

---

36. Exhibit VV; A. 910.

37. Exhibit WW; A. 916.

38. As noted by the Court of Appeals, 72 of the 113 new hires in the first half of 1973 were minorities, a total of 64% of all employees hired. Of the 95 line drivers hired in the first six months of 1973, 29 (over 30%) were minorities. 517 F. 2d at 316, note 31; Pet. A. 28. During the first quarter of 1976 minority employees constituted 15.6% of the company's total work force, according to the Quarterly Report recently filed with the District Court under the terms of the Consent Decree.

39. Commentators have suggested that such factors should be considered in determining whether a discriminatory pattern properly may be inferred from statistics showing a disparity between the work force and the general population: "[T]he inference [of a discriminatory pattern] is false if, for example, the measured geographical area does not coincide with the relevant labor market." Note, Employment Discrimination: Statistics and Preferences Under Title VII, 59 Va. L. Rev. 463, 469 (1973).

qualifications, nor were the exhibits supported by the underlying documents.[40]

The government also relied upon statistics to show that supervisory, line-driver and mechanics jobs were more desirable because they were higher paying. However, the company's statistics reflected that the supervisory personnel receive an *effective* hourly rate generally *below* that of union personnel, that mechanics receive an insignificant amount more per hour than servicemen, and that there is no clear pattern as to whether city drivers make less than line-drivers on a regular predictable basis, the earnings in all categories depending upon the volume of business, the hours worked and the working efforts of each individual employee.[41]

At the trial T.I.M.E.-DC demonstrated the numerous deficiencies in the government's statistics through the expert testimony of Professor Clay George.[42] Professor George, who has an extensive background in psychology, motivational characteristics of ethnic and racial groups, and statistics, reviewed the government's statistical evidence and concluded that the numerical data available was not sufficient to justify the conclusions reached by the government. Professor George testified that the statistics were unreliable at locations with a small number of individuals and that Spanish-surnamed Americans were included with whites in the SMSA statistics.[43] He also demonstrated that the statistics were unreliable by reason of their failure to take into account a number of factors which affect the percentage of minorities available as candidates for employment.[44]

---

40. Testimony of Catherine McGinn, transcript 45-82; A. 299-319.

41. Exhibits KKK; MMM; PPP; Plaintiff's Exhibit 231; Testimony of Charles F. Hutchinson, transcript pages 700-703; A. 980, 986, 987, 898, 609-12, respectively.

42. Professor of Psychology, Texas Tech. University. A. 541.

43. George testimony; transcript 593, 594; A. 548-50.

44. For example, minority families have more children in a lower median age than whites and accordingly there is a smaller percentage of minorities available as part of the working force than whites. Exhibit BBB, Tables 1-4; A. 964.

Other relevant factors not reflected in the statistics include the greater reluctance of blacks to move from place to place, motivational factors (achievement and competitiveness), greater health problems and higher death rates in the case of minorities and a lower socio-economic status that is attributable to a culture of poverty among many minority persons. All of these factors make it difficult to predict statistically what part of the Negro community in any particular area would be available as candidates for employment.[45]

The Court of Appeals rejected T.I.M.E.-DC's attack on the government's statistical evidence[46] and pointed to the fact that the government buttressed its statistical evidence with a "massive" amount of testimony presented by live witnesses and by depositions taken at ten of the T.I.M.E.-DC terminals.

A review of this testimony reflects that it involved situations which petitioner submits were too isolated in number and in time to serve as a basis for a finding of a systemwide pattern or practice of discrimination. Thus, of the 379 persons for whom the plaintiff sought class and individual relief at various terminals, some 34 individuals testified, and the witnesses who testified regarding alleged class discrimination were generally concentrated in a few locations.[47]

---

45. Testimony of George, transcript pages 594-615; A. 550-64.

46. The Fifth Circuit appears to believe that a pattern of racial discrimination has been conclusively established in the trucking industry. Citing *Rodriguez* and its companion cases (see Footnote 27, supra) the Court stated below that the holding there "for this very industry and employment practices eliminates all doubt of the decisive significance of flagrant statistical deviations." 519 F. 2d 299, 313; Pet. A. 23. In *Rodriguez* the Court discussed the large number of suits brought in Federal court alleging hiring discrimination in the trucking industry and concluded that "a clear pattern has emerged." Furthermore, to support its conclusion that the statistics in *Rodriguez* established a prima facie case of past discrimination in hiring, the Court there relied upon statistics in *other* cases which the Court said involved similar employment situations. 505 F. 2d 40, 53-54.

47. For example, seven alleged class members out of an alleged class of 44 at Memphis testified, 4 of 17 from Atlanta, 6 of 16 from Nashville, 4 of 43 at Montebello, California, and 4 of 129 at Vernon, California. These five (of 20 road terminals where relief was sought) accounted for 25 of the 34 witnesses who testified as to alleged classes of discriminatees.

For the majority of the terminals where the government sought to create classes for relief there were absolutely no witnesses who testified as to alleged discrimination at those terminals.[48] Furthermore, much of the government's testimony related to alleged acts of discrimination by T.I.M.E.-DC's predecessors long before Title VII became effective in July of 1965.[49]

In short, T.I.M.E.-DC submits that the statistics and individual testimony offered by the government were insufficient to establish a systemwide pattern or practice of employment discrimination in view of the counter-statistics of the company reflecting increased minority utilization in the face of decreasing personnel needs, the well established company policy of utilizing the best qualified applicant[50] and the absence of a no transfer policy.[51]

The government also asked the District Court to find that 20 of those who testified were individual discriminatees. T.I.M.E.-DC analyzed each instance of alleged discrimination to demonstrate that the individuals were not the victims of unlawful discrimination under this Court's analysis in *McDonnell Douglas, supra*[52].

48. Thus there was no testimony at 11 of the 20 terminals where the government sought relief, including San Antonio, Lubbock, Phoenix, Chattanooga, Paris, Cincinnati, Kansas City, Knoxville, Portland, St. Louis and Seattle.

49. For example, the claim for class relief at Memphis primarily grew out of several incidents occurring in 1956 to 1958, never occurring again at that terminal. Similarly, the claim for class relief at Atlanta grew out of basically two isolated events before the effective date of the Act. The Los Angeles terminals similarly involved mostly pre-Act incidents. A. 215-19; 211-12; 201-09.

50. See summary of Stroud dep. of 6/15/71, Atlanta, p. 9; Nagle dep. of 9/28/71, Los Angeles, pp. 13-17; testimony of Roy Wilkins, transcript 467; A. 104; 475-76, respectively.

51. See discussion at page 5 and in note 6, *supra*.

52. There this Court held: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

In response the District Court found that some *30* employees were individual discriminatees (plus four persons falling into a "gray area"), only six of whom were included on the government's list of individual discriminatees.

On appeal T.I.M.E.-DC attacked the District Court's findings as "clearly erroneous" and analyzed the 48 persons who were either listed by the government as individual discriminatees or found by the District Court to be discriminatees. It was shown that *every one* failed to meet the standards of *McDonnell Douglas* in one or more particulars by reason of failure to apply for the job desired, the lack of an opening at the time of application, lack of equal qualification with the next hires in the category in question or, in many instances, for failure of any proof with respect to these critical questions.

Inasmuch as the court below flatly refused to consider the application of the *McDonnell Douglas* criteria, it seems unnecessary here to repeat the rather detailed analysis made by petitioner below. However, several examples should illustrate typical deficiencies in the government's evidence in proving either individual discrimination or a systemwide pattern or practice of employment discrimination.

One of the few individuals regarded by both the government and the District Court as entitled to individual relief was Richard Stinson, a black who alleged that he had made an oral application for a line-driver job with Los Angeles Seattle Motor Express (LASME, one of the several predecessors of T.I.M.E.-DC) at its Hayward (San Francisco) terminal in about March of 1969.[53] Stinson was not listed by the government as an alleged individual discriminatee on its list of April 1, 1971 and was not deposed at San Francisco, but did testify at the trial of the case in Lubbock, Texas. In March of 1969, when Stinson said he inquired about the line-driver's job, there were no road driver openings. This was reflected by plaintiff's Exhibit 6, the terminal seniority roster of December 30, 1970, which reflected that there were no road driver hires at the terminal between February of 1969 and November of 1969. Plaintiff produced no

53. Plaintiff's Proposed Findings of Fact, page 7.

evidence as to whether T.I.M.E.-DC continued seeking applicants after Stinson was not hired, nor whether Stinson was as qualified as the next hire.

Stinson testified that he also applied for a line-driver job with the company in 1971 by sending a letter[54] stating conclusions as to his qualifications, but that he refused to fill out the company's required application form on the basis that his letter constituted a sufficient application.[55] In any event there were no jobs open at the time, and no line-drivers were subsequently hired at Hayward (after September 4, 1970).[56]

Another individual found by the Court to be an individual discriminatee was Edgar C. Rudison, a black employed as a city driver with the company in Los Angeles since 1950. Although Rudison claimed to have asked officials (including the terminal manager) at TIME Freight (another T.I.M.E.-DC predecessor) for a line-driver job, he further stated that he had not applied for a line-driver job at T.I.M.E.-DC or any of its predecessors. [57] Inasmuch as Rudison never actually applied for the job of line-driver, it was impossible to apply the remaining *McDonnell Douglas* criteria. However, the record did reflect that Rudison had a series of chargeable accidents while employed as a city driver at T.I.M.E.-DC or its predecessors,[58] thus creating doubts as to Rudison's qualifications.

Another individual found by the Court entitled to relief as an individual discriminatee was Jose R. Almaraz, a Spanish-surnamed American city driver employed at the company's Montebello (Los Angeles) terminal. Like Rudison, Almaraz never applied to transfer from city driver to line-driver. Indeed, the evidence was that Almaraz actually *refused* the opportunity to work as a line-driver in a sleeper cab operation in 1968 or

---

54. Exhibit OOO; testimony of James W. Frazier, transcript page 635-36, A. 566.

55. Testimony of Frazier transcript page 638, A. 568.

56. Testimony of Frazier, tranxcript page 641, A. 570.

57. Rudison deposition, pages 1-11.

58. Defendant's Exhibit M.

1969.[59] Nevertheless, the District Court found that Almaraz was among the individual discriminatees entitled to seniority relief.

A similar situation was that of John Passi, a Polynesian employed as a city driver with the company in Los Angeles since 1965. Passi asked Anthony W. Lillywhite, driver supervisor at the Los Angeles terminal, for extra line work on weekends, but never asked for a full-time line-driver position and never actually filed an application for a regular line-driving job with either LASME or T.I.M.E.-DC.[60]

One of the individuals claimed by the government to be representative of a class at Nashville was Lee Jones, a black service man for Super Service (another predecessor company) and T.I.M.E.-DC since 1952. The government did not allege or prove that Jones desired or asked for any other job.[61] Nevertheless, the District Court found that Jones was an individual discriminatee entitled to seniority relief.

As indicated above, in the Court of Appeals petitioner analyzed the evidence with respect to *all* of the persons either claimed by the government or found by the District Court to be individual victims of discrimination. The response of the Court of Appeals was that the District Court "was not compelled to credit" the employer's contention that there were no openings or that the applicants had not completed their applications properly, that the trial court at the liability stage[62] "was not required to sustain" the defendants' attack as to the credibility, availability or qualification of individual discriminatees, and that *McDonnell Douglas* was "inapplicable to a pattern and practice suit.[63]

While the Court's holding that the trial court should have disregarded the employer's evidence as to the qualification or availability of individual discriminatees, or the lack of job open-

---

59. Almaraz deposition, pages 15-16; Lillywhite deposition of 9/28/71, pages 7-8, 11-12.

60. Deposition of Passi, page 7; deposition of Anthony Lillywhite of 9/28/71, page 9.

61. United States Proposed Findings of Fact, page 42.

62. See note 18, *supra*.

63. 517 F. 2d 299, 316; Pet. A. 27.

ings, may have resulted from the mistaken belief that the trial in the District Court involved only the question of liability, the result of the holding below is clear: The government in a pattern and practice case in the Fifth Circuit can establish a prima facie case based upon incumbency statistics alone, without regard to the employer's post-Act hiring and job placement efforts and without regard to the availability of jobs or of qualified applicants. Furthermore, once the plaintiff establishes its statistical "prima facie" case of employment discrimination, the employer is effectively precluded from rebutting the plaintiff's case and from even attempting to prove that the individual employees in question "were not in fact victims of previous hiring discrimination."[64]

Such a result is contrary to the legislative intent of Title VII and to the Court's pronouncements in *Griggs*, *McDonnell Douglas*, *Albemarle Paper* and *Franks*.

II.

IN FASHIONING A REMEDY IN A PATTERN OR PRACTICE CASE A DISTRICT COURT HAS DISCRETION TO AWARD RELIEF TO INDIVIDUALS ON THE BASIS OF THE DEGREE OF INJURY SUFFERED.

Once a district court has found an unlawful pattern and practice of racial discrimination, what sort of seniority relief is proper? That question, which has produced conflicting results in the Circuit Courts of Appeal, is one of the central issues in this appeal.

After finding that the defendants were in "general violation of Title VII" and that T.I.M.E.-DC had engaged in a plan and practice of discrimination, the District Court said "The next issue is whether the individuals listed have been the victims of this discrimination."[65] The Court then reviewed the government's list of individuals for whom relief was sought and the government's claim that "since these people were hired during a period in which T.I.M.E. was practicing a plan and pattern of

---

64. *Cf. Franks* v *Bowman Transp., supra* at 1268.

65. Pet. A. 62.

discrimination. . . .they are members of a class affected by T.I.M.E.'s discriminatory practices." The District Court continued as follows:

> "The Court accepts this view to the extent that all are members of an affected class. However, this Court does not hold that all members were injured individually by being within the class, or that those who were injured were all affected to the same degree. This Court, in fact, does hold that some were not injured by being a member of the class, and that those who were injured were injured in varying degrees. There are no degrees of discrimination — discrimination is discrimination, and if made on the basis of race is deplorable whatever the degree; however there *are* degrees of injury due to that discrimination — and this is important in determining the equitable relief this Court should afford these individuals."

The trial court thus attempted to fashion a remedy consistent with the degree of injury suffered by the members of the affected class, recognizing that not all members of the class were necessarily injured and therefore entitled to substantial seniority carry-over simply because they were in the class.

The Court of Appeals not only rejected the specific relief awarded by the District Court, but also criticized the Court for even considering individualized proof of discrimination and injury. While this may have been partially the result of the Circuit Court's belief that only an issue of liability was before the District Court, petitioner submits that the District Court properly considered the degree of injury suffered by individual members of the class and attempted to award relief accordingly.

It is thus petitioner's position that the District Court properly considered individualized proofs, but erred in its specific findings of individual discrimination, as well as in its holding that these few individual cases proved a systemwide pattern or practice of employment discrimination. However, assuming *arguendo* the validity of the District Court's findings of individual discrimination, the proper remedy was of the sort envisioned by the District Court: individual relief to the identifiable victims of discrimination.

Consideration of the remedy issue necessarily requires an examination of individual situations. As stated by Justice Powell, "Specific relief necessarily focuses upon the individual victim, not upon some 'class' of victims."[66] However, under the decision of the Court of Appeals, the District Court is precluded from determining which individual employees were "individual or class discriminatees suffering the present effects of past discrimination", the specific question reserved for the Court under Paragraph 13(a) of the consent decree.[67] Instead, the District Court is required to give "full company employment seniority carry-over for bidding and lay-off purposes, subject . . . to the proper application of the qualification date principle,"[68] regardless of the extent of injury, if any, which the individual members of the class suffered by reason of unlawful discrimination. The Circuit Court asserted that such seniority relief was necessary to give all members of the affected class their "rightful place" in the company's work force.

While various courts have endorsed the concept of "rightful place" relief —*i.e.*, giving a discriminatee the seniority which will restore him to the position in the work force he would have occupied but for the unlawful discrimination — the application of the concept has produced different results in the various circuits.

The Fifth Circuit enunciated the doctrine in *Local 189, United Paper Makers and Paper Workers* v *United States*, 416 F. 2d 980 (5th Cir. 1969), and subsequently followed it in *Bing* v *Roadway Express, Inc.*, 485 F. 2d 441 (5th Cir. 1973). In *Bing*, which arose out of a challenge to Roadway's "no-transfer" policy, the Court stated that "How much seniority a transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." 485 F. 2d 441, 450. However, the Circuit Court did not require proof of any *prior* indication of a desire to transfer from the city to the road, but held that upon proof of a *present* desire to transfer, the

---

66. *Franks* v *Bowman Transportation Co., Inc., supra* at 1276, n. 8 (Dissenting opinion).

67. Decree in Partial Resolution of Suit, ¶ 13(a); Pet. A. 90.

68. 517 F. 2d 299, 321; Pet. A. 38.

employee should be awarded seniority carry-over from the city to the road as of the date the individual possessed road qualifications. Similarly, in *Rodriguez, supra*, the Fifth Circuit held that all minority employees were to be given full carry-over seniority based not upon any showing of when the individual actually would have transferred absent discrimination, but upon "whether he desires to transfer now."

In the instant case the Fifth Circuit went even further, rejecting the trial court's examination of individual situations and holding that *all* minority employees within the class were entitled to full seniority carry-over for all purposes, irrespective of whether they were injured by discrimination. In so holding the Court acknowledged that its interpretation of the "rightful place" doctrine was in direct conflict with that of the Sixth Circuit in *Thornton* v *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974).[69]

In *Thornton* the Sixth Circuit specifically approved the "rightful place" theory enunciated by the Fifth Circuit, but rejected the "qualification date" formulation which gives a putative transferee carry-over seniority as of the date he had the experience necessary to qualify him for a road driving job. Instead, the Court affirmed the District Court's grant of seniority carry-over dating from six months after the transferee requested transfer or filed a charge with the EEOC. In so holding the Court noted that the qualification date formulation of the Fifth Circuit in *Bing* was not a strict application of the "rightful place" theory, in that "an employee might have become qualified to be a road driver on a given date, but he may have had absolutely no desire on that date to become a road driver."[70]

---

69. The conflict with *Thornton* also was acknowledged in *Rodriguez, supra* at 64.

70. 497 F. 2d 416, 421. As noted by the government in its brief in opposition to the petitions for certiorari in the instant cases, subsequent to *Thornton* the Sixth Circuit in *Equal Employment Opportunity Commission* v *Detroit Edison Co.*, 515 F. 2d 301 (6th Cir. 1975) held that seniority relief "should be available regardless of whether an employee actually sought a transfer previously," citing the dissenting opinion of Chief Judge Phillips in *Thornton*. However, in so holding the Sixth Circuit did not repudiate the holding of the majority in *Thornton*, but instead held that "in the context of this case [*Detroit Edison*] where the previous system worked so strongly against transfers for blacks seniority should be available regardless of whether an employee actually sought a transfer previously." 515 F. 2d at 316.

In *United States* v *Navajo Freight Lines, Inc.* 525 F. 2d 1318, 1326 (9th Cir. 1975), the Ninth Circuit endorsed the concept of "rightful place," but demonstrated that in applying this concept various results are possible (and appropriate):

> "Alternatives which are open include those which permit a discriminatee to carry over seniority from the date he applied for a road driver position, or from the date he took some overt action to protest the discrimination, or from the date he qualified or would have qualified but for the discrimination for a road driver position, or from the date he was employed by the trucking company, or from the date employed at a particular terminal. Other alternatives, including direct adjustment of non-minority seniority, undoubtedly also lie within the broad remedial powers of the Court under the authority of Title VII."

The Ninth Circuit in *Navajo* adopted the Fifth Circuit's qualification date formulation in principle, but noted that frequently it was not possible to determine the qualification date. Under these circumstances the Court held that the lower court's granting of terminal seniority was appropriate. However, in approving the trial court's remedy the Ninth Circuit also remanded the case for the purpose of having the trial court consider the seniority rights of non-minority road drivers.

In *Franks* v *Bowman Transportation Co., supra,* this Court considered the application of the "rightful place" doctrine to persons who had been discriminatorily refused initial employment.[71] Noting that the Court in *Albemarle Paper Company* v *Moody*[72] had recognized the "make-whole" objective of Title VII, the Court found that this ordinarily required the granting of seniority relief "slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application."[73]

---

71. The individuals in question made up "a class of black non-employee applicants for OTR [over-the-road] positions prior to January 1, 1972." 96 S. Ct. at 1258. Significantly, the class was made up only of identifiable post-Act victims of racial discrimination "whose applications were put in evidence at the trial." 96 S. Ct. at 1261.

72. 422 U.S. 405 (1975).

73. 96 S. Ct. at 1265.

While indicating that such seniority relief generally would be required, the Court indicated that in exercising its equitable discretion the district court may deny such seniority relief if it does so "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," citing *Albemarle Paper*.

Further limitations in the Court's holding as to the granting of seniority relief are apparent. In the first place, the Court's review in *Franks* was specifically limited to victims of *hiring* discrimination, identifiable individuals who actually filed employment applications. Secondly, the Court clearly indicated that the employer must be given the opportunity to prove that the individuals in the class "were not in fact victims of previous hiring discrimination," citing *McDonnell Douglas Corp.* v *Green*, 411 U.S. at 802, and *Baxter* v *Savannah Sugar Refining Corp.*, 495 F. 2d 437, 444 (5th Cir.) cert. den., 419 U.S. 1033 (1974). Thus, as specifically noted by the Court, the employer "may attempt to prove that a given individual member of [the] class . . . was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally." Moreover, "evidence of a lack of vacancies in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions" is relevant.[74]

Finally, in concluding its opinion in *Franks* the majority again emphasized the plenary equitable power vested in the district courts in Title VII actions:

> "In holding the class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under Section 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another and — owing to the structure of the federal judiciary —

74. 96 S. Ct. at 1268, n. 32.

> these choices are of course left in the first instance to the district courts.' *Albemarle Paper, supra*, 422 U.S. at 416."[75]

Petitioner submits that the decision below of the Fifth Circuit rejecting the trial court's remedy and ordering wholesale seniority relief cannot be justified on the basis that it is required by the "rightful place" doctrine. Even assuming *arguendo* that the government established a prima facie case of liability as to certain affected classes, this does not end the court's inquiry:

> "Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the class, has suffered financial loss, and thus entitled to back pay or other appropriate relief." *Baxter* v *Savannah Sugar Refining Corp., supra* at 443-44.

In this connection the criteria set forth in *McDonnell Douglas* are relevant.[76] The Circuit Court brushed aside the petitioner's rather extensive effort to demonstrate that the individual members of the affected class were not the victims of unlawful discrimination entitled to relief (other than the monetary damages which they received under the consent decree), noting that "Whatever evidentiary hearings are required for individuals can be postponed to the remedy." As indicated above, this ignores the fact that both the issues of liability and remedy were tried in the district court.

To attempt to prove that the company had engaged in an unlawful pattern or practice of employment discrimination at various terminals throughout its extensive system the government chose to take depositions at ten of the employer's terminals and to introduce certain live testimony as well, presumably utilizing its best witnesses. These witnesses were fully examined and cross-examined with respect to such questions as whether the employee was qualified for the job in

---

75. 96 S. Ct. at 1271.

76. Contrary to the holding of the Fifth Circuit that *McDonnell Douglas* is "inapplicable to a pattern and practice suit" (517 F. 2d 299, 316; Pet. A. 27) or to a class action (*Rodriguez*, 505 F. 2d 40, 55).

question, whether he actually filed a job application, whether a vacancy existed, when the next employee was hired in that classification, and so forth. No effort was made to limit the inquiry on direct or cross-examination to the question of liability as to either the individual or to the class.

Petitioner believes that it was able to show both the absence of any systemwide pattern or practice of employment discrimination and that the individual employees in question were not the victims of unlawful discrimination entitled to seniority relief.[77] Under the approach of the Fifth Circuit such efforts were obviously futile, because on the question of liability ("at the liability stage") the trial court "was not compelled to credit" petitioner's contentions as to a lack of openings or the failure of purported applicants to file proper application forms, nor "to sustain the counterattack on the testimony of individual discriminatees as to credibility, availability or qualification."[78]

The petitioner's efforts were similarly wasted as to the *remedy* issue, in that the Circuit Court held that it was premature and inappropriate for the trial court to consider individualized proof at the trial. While the Circuit Court found that "it would defy reason and waste precious judicial resources for the [trial] court either to require or permit individualized proof," the fact of the matter is that the government tried its case through the introduction of such proof and there was in fact a full trial on the merits. To require the parties to return to the district court to retry the case at "evidentiary hearings" truly does seem to "defy reason and waste precious judicial resources," whether or not the court uses special masters as suggested by the Court of Appeals.

---

77. See discussion at page 22, *supra*.

78. 517 F. 2d 299, 315; Pet. A. 26, 27.

III.

THE SAME STANDARDS FOR DETERMINING INDIVIDUAL RELIEF UNDER TITLE VII SHOULD APPLY, REGARDLESS OF WHETHER THE ACTION IS AN "INDIVIDUAL," "CLASS" OR "PATTERN OR PRACTICE" SUIT.

The Circuit Court's refusal to apply the "analytical steps delineated by the recent case of *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792 (1973)" on the basis that the case "is inapplicable to a pattern and practice suit" has been discussed above,[79] and that discussion will not be repeated here. The Fifth Circuit's position that *McDonnell Douglas* is inapplicable to a pattern or practice case, or to a class action, or to a case involving an alleged history of hiring discrimination, should be put to rest by this Court's decision in *Franks, supra*, a class action involving an unlawful pattern of racial discrimination. While the opinion in *Franks* does not directly set forth the manner in which *McDonnell Douglas* is to be applied, it cites *McDonnell Douglas* and implicitly recognizes the applicability of the *McDonnell Douglas* criteria in determining whether individual employees within an affected class were actually damaged by racial discrimination.

Whether an individual sues or the government brings a class action the critical inquires should be the same: Was there unlawful racial discrimination, was the individual damaged thereby and, if so, what will it take to give him appropriate relief? The District Court attempted to deal with these questions and fashion a remedy accordingly. It is submitted that the evidence should be viewed in these terms, rather than simply granting wholesale seniority relief solely on the basis of race.

---

79. See p. 22, *supra*.

IV.

WHERE A UNION CONTRACT PROVIDES THAT LAID OFF EMPLOYEES HAVE FIRST CALL TO REINSTATEMENT RIGHTS FOR A THREE-YEAR PERIOD, INDIVIDUAL MINORITY EMPLOYEES WHO HAVE NEVER BEEN EMPLOYED IN SUCH POSITIONS AND WHO ARE NOT FOUND TO HAVE BEEN AFFECTED BY RACIAL DISCRIMINATION SHOULD NOT BE GRANTED PRIORITY OVER LAID OFF EMPLOYEES.

Finally, petitioner submits that the Court of Appeals erred in upsetting that portion of the District Court's final order designed to protect laid off incumbents. Under the terms of the District Court order a vacancy was not deemed to exist until it continued for three years. A laid off employee on the seniority roster where an opening occurred would therefore have preference to fill a vacancy without competition from members of the "affected class" for a period of three years, consistent with a provision in the union contract to the same effect.

While acknowledging that the contractual provision in question was not adopted for discriminatory purposes, the Circuit Court nevertheless modified the lower court's decree to eliminate the contractual protection given to laid off line-drivers. Thus, under the decision of the Court of Appeals, "When a vacancy which is not a purely temporary one arises in the LD position at a T.I.M.E.-DC terminal, any LD on lay-off at that terminal may compete against members of the affected class on the basis of full employment seniority."[80] If nothing else the Circuit Court's decision on this point obviously is ambiguous, in that the company is given no guidance whatsoever in determining whether a vacancy is deemed to be a "purely temporary" one (as to which the laid off employee continues to have a preference) or whether it has become something other

80. 517 F. 2d 322-323; Pet. A. 41.

than "purely temporary" (in which case members of the affected class may compete on the basis of their company seniority).[81]

The Circuit Court also ordered changes in the modified seniority system of the Southern Area Conference to "speed up the advancement of discriminatees into the LD position."[82] The effect of this alteration would be to diminish the seniority rights of incumbent line-drivers within the Southern Conference, as well as to create administrative problems for the company.

In altering valid contractual provisions to permit the acceleration of the advancement of members of the affected class to the detriment of incumbent employees the Court would require the company and the union to engage in reverse discrimination contrary to the purpose of Title VII.[83]

As reflected by Section 703(h), Congress did not intend that Title VII be used to abolish non-discriminatory seniority provisions. Furthermore, the legislative history reflects an intent to require employers to fill future vacancies on a non-discriminatory basis, not to accelerate the progress of one group of employees at the expense of another.[84]

---

81. Similar ambiguity is found in the Circuit Court's statement at the conclusion of its opinion that "the record should be developed when necessary to examine the impact of such a preference [to victims over non-victims] on current non-victim, incumbent employees who have been employed by the company longer than a particular victim." 517 F. 2d at 324, Pet. A. 44. If the Circuit Court is suggesting that the District Court on remand should provide for transfer to the road of *all* city employees — white as well as black and SSA — in effect this would create a *mandatory* transfer policy. In view of the difficulties this would create for the company in terms of retraining alone, and in light of the company's experience in Memphis, T.I.M.E.-DC opposes any such relief.

82. 517 F. 2d 299, 323; Pet. A. 42-43.

83. See p. 15, *supra*.

84. See p. 15, *supra*.

CONCLUSION

Petitioner T.I.M.E.-DC submits that the statistical and other evidence below was insufficient to establish a pattern or practice of unlawful employment discrimination at various terminals throughout its system, particularly in light of the company's acknowledged efforts and progress in eradicating the vestiges of earlier discrimination. Assuming *arguendo* that liability under Title VII was established, the District Court properly exercised its equitable jurisdiction in fashioning a remedy consistent with the degree of injury suffered by the individuals making up the affected classes. The Court of Appeals therefore erred in overturning the District Court's remedy and ordering wholesale seniority relief to all members of the affected classes, irrespective of the degree of injury, if any, actually suffered. The Court also erred, it is submitted, in holding *McDonnell Douglas* proofs inapplicable to pattern or practice cases. Accordingly the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

ROBERT. D. SCHULER
R. IAN HUNTER
JOHN W. ESTER
Attorneys for Petitioner T.I.M.E.-DC, INC.

100 West Long Lake Road—Suite 102
Bloomfield Hills, Michigan 48013
(313) 645-9600

MATHESON, BIENEMAN,
PARR, SCHULER & EWALD
Of Counsel
100 West Long Lake Road—Suite 102
Bloomfield Hills, Michigan 48013
(313) 645-9600